No. 10340

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PACIFIC FRUIT & PRODUCE COMPANY, A CORPORATION, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was invoked under Section 24 of the Judicial Code, as amended, 28 U. S. C. § 41 (1), upon the ground that the United States is party plaintiff (R. 2). The jurisdiction of this court rests on Section 128 of the Judicial Code, as amended, 28 U. S. C. § 225, giving the circuit courts of appeal jurisdiction to review final decisions of the district courts.

STATEMENT OF THE CASE

This is an appeal from a judgment of District Judge Schwellenbach, rendered on July 6, 1942, dis-

missing with prejudice the complaint of the United States in an action for an accounting.

The complaint filed by the United States on January 22, 1941, in the District Court of the United States for the Eastern District of Washington, Northern Division, set up twenty separate causes of action against Pacific Fruit & Produce Company of Seattle, Washington. Typical of these was the third cause of action, which involved the following undisputed facts as found by the courts:

In 1936 and 1937, the United States through the Farm Security Administration (formerly the Resettlement Administration) loaned money upon promissory notes to George M. Brisky and Evelyn Brisky of Chelan County, Washington, taking as security a crop and chattel mortgage which gave the United States a first lien on all fruit crops produced or to be produced by the Briskys during 1937 upon specified real property (R. 219–221). The sum of $770.11 remains due and owing to the United States on these notes, with interest thereon at the rate of 5 per cent per annum until paid (R. 221, 224).

The funds advanced to the Briskys by the United States were insufficient to finance the entire cost of producing and marketing their 1937 fruit crops, and the additional funds needed for such purpose were obtained from defendant upon the security of a lien on those crops (R. 224–225). To enable these additional advances to be made, the United States agreed to subordinate its lien upon the Briskys' 1937 fruit crop to the lien in favor of defendant, but such subordination was expressly "limited to the extent of

60 cents per box on all fruit sold by the mortgagors" (R. 225–226). The subordination agreement gave defendant "the right to deduct and receive from all sales made by the said mortgagors of their 1937 fruit crops the sum of 60 cents per box from each sale made by them" until the loan made by the defendant shall have been paid in full, and the agreement gave the United States "a first lien on all proceeds from each and every sale of any part of the mortgagors' 1937 fruit crops after the deduction of 60 cents per box from the proceeds of each sale has been made" by defendant (R. 225, 226). Thereafter, defendant advanced funds and rendered services to the Briskys to aid them in financing the production, handling, or marketing of their 1937 fruit crops, and the Briskys delivered to defendant their entire 1937 crop, consisting of 1,137 boxes of apples (R. 226).

Each of the twenty causes of action in the complaint related to a different borrower, set up the amount due the United States from that borrower and described the land upon which he was to raise the 1937 fruit crop mortgaged to the Government. All twenty causes of action were otherwise the same, alleging that the Government's mortgage on the 1937 fruit crop of the borrower had been subordinated in favor of defendant to the extent of 60 cents per box and that the entire 1937 crop of each borrower had been delivered to defendant (see Appendix, p. 31, *infra*). The complaint prayed that defendant be ordered to render a full accounting of the transactions between it and each of the borrowers named in the twenty causes of action, relating to the production, handling, and sale of their

1937 fruit crops; the sums advanced and the services rendered or charges incurred in behalf of each borrower; the quantity and quality of the 1937 fruit crops delivered by each borrower to defendant; the proceeds of each sale of such crops; and the amount defendant was authorized to deduct therefrom as reimbursement for funds advanced and services rendered to the borrower. The complaint also prayed "that plaintiff have judgment against the defendant for any sums or balances found to be due to the plaintiff upon such accountings, and that the plaintiff have such other and further relief as may be just, together with costs of this action" (R. 12–13).

Defendant's motion to dismiss every cause of action (R. 39) was denied (R. 40), and defendant thereupon filed an answer, alleging that the United States had released its lien on the 1937 crops of the borrowers, and that defendant had advanced funds to each borrower and "purchased the entire crop from each of the borrowers and accounted in full to the borrowers for all fruit delivered to it" (R. 44).

The matter came on for trial before Judge Schwellenbach on April 28, 1942, and by the court's direction only the third cause of action was tried (R. 46), the judgment in that cause to be "applicable to the other causes of action contained in the plaintiff's complaint" (R. 219, 229).

At the trial, plaintiff contended that the Government's first lien on the Briskys' 1937 fruit crops, as modified by the subordination agreement, required that all proceeds received by defendant from each separate sale of the fruit in excess of 60 cents per box must be

paid over to the Government before deduction of any charges such as warehousing, freight, storage, and the like (R. 51–54). Plaintiff further contended that although Government agents had examined defendant's books, they could not ascertain to whom nor at what price defendant had sold the Briskys' fruit and that defendant had never furnished any additional information on this score (R. 52–53). Defendant contended, on the other hand, that it had purchased the fruit from the Briskys outright and was required to apply against Briskys' debt to defendant only the sale price as between them, so that the price defendant received for the fruit from subsequent purchasers was legally immaterial (R. 54–57). The court ruled, for the purposes of the trial, that the subordination agreement contemplated sales to third persons, and not sales by the Briskys to defendant (R. 138).[1]

Defendant's ledger sheets were introduced in evidence, showing the sums advanced and services rendered to the Briskys and the amount credited to them for sales of fruit to defendant, but giving no indication of what disposition defendant had made of the fruit (R. 76, 197–199). Plaintiff adduced evidence that defendant as a rule had commingled Briskys' fruit with the fruit of other growers and had shipped the commingled fruit to defendant's different branches throughout the country (R. 62–66), although

[1] Where a mortgagee purchases the mortgaged property from his mortgagor, a junior lienor is entitled to have the fair market value of the property credited upon the senior lien irrespective of the sale price fixed between mortgagor and mortgagee. *Lynch* v. *Naylor*, 63 Ill. App. 107; *Carroll* v. *James*, 162 N. C. 510, 77 S. E. 337; 11 *C. J.* § 517, p. 711.

in a few instances defendant sold the fruit to outsiders (R. 68). Defendant's accountant testified that it was virtually impossible to trace the ultimate sales of Briskys' fruit made by defendant's branches (R. 140, 141, 144, 168). The court ruled that since defendant had received mortgaged property with knowledge of the Government's lien, it was under an obligation to show its disposition and the amount received therefor; and that if by mixing Briskys' fruit with other fruit and shipping the combined fruit to branch houses defendant rendered it impossible to trace Briskys' fruit or ascertain its selling price, plaintiff may prove its fair market value at the date of such shipment (R. 134–135, 138, 143, 145). The court further ruled that unless adequate evidence was adduced by defendant as to when those shipments were made, the market value of the fruit as of one week after defendant received it, which is a reasonable time, may be proved, but defendant may negative such evidence by other factors (R. 161, 172).

Records brought to court by defendant's officers were then introduced, showing shipments and sales of Briskys' fruit made by defendant (R. 146–158, 165). These accounted for 298 boxes out of a total of 1,137 boxes of Briskys' fruit delivered to defendant (R. 169, 226–227). Plaintiff's demand that defendant be ordered to account for the disposition of the remaining fruit (R. 168) was denied as untimely (R. 169).

Plaintiff then attempted to qualify a Government agent as an expert on the market value of the fruit during the period in question, but was unsuccessful because the court ruled that the witness could not base

his reply solely on reports issued by the Bureau of Agricultural Economy, Department of Agriculture, as to sales of fruit in the vicinity during that time (R. 173–174; 175–179). An attempt to qualify other witnesses failed (R. 182–183). Thereupon, Government counsel moved for a voluntary nonsuit (R. 184), arguing that the inability of the Government's witness to qualify as an expert on market values was a surprise and not due to lack of diligence; that the Government's inability to bring in other witnesses at that time prevented arriving at an adequate formula in what was essentially a test case; that the case is far reaching and affects the financing of the apple crop as well as the methods used by the Government in subordinating its lien to other lenders; and that in fairness to the growers as well as to defendant, a proper trial of the matter should be had (R. 184–187). The defendant opposed this motion and moved for dismissal with prejudice because the Government had not adequately prepared its case and had put defendant to tremendous expense (R. 186). The court then stated (R. 185–186):

> I wouldn't consider granting the motion [of plaintiff] without some substantial payment of costs. Costs are not taxable against the United States. I would just say you couldn't start another lawsuit until the Government has paid something.

The court then ruled that if this suit involved only one instead of twenty causes of action, plaintiff's motion to dismiss without prejudice would be denied and the case decided on its merits, but since the case involved a matter of general policy and Governmental

assistance to growers and warehousemen, plaintiff's motion without prejudice would be granted, on condition that the United States pay defendant $250.00 within 45 days to reimburse it for its expenses in preparing for trial; otherwise the entire complaint would be dismissed with prejudice (R. 192–195). In response to defendant's objection that the figure was too low, the court admitted that it was impossible to arrive "at the proper figure of just compensation," and that the $250.00 was "more or less an arbitrary figure" picked "out of the air" (R. 195), but added that if defendant had won the case on the merits, it would have no compensation at all (R. 195). The court also admitted that "it's impossible to determine how much the defendant has been compelled to spend as the result of preparation of this case" (R. 192–193).

An order of dismissal was then entered on April 29, 1942, reciting that if plaintiff should pay defendant $250.00 within 45 days "to reimburse it for funds expended in preparation of its defense," the action would be dismissed without prejudice; otherwise it would be dismissed with prejudice (R. 215–216).

On June 25, 1942, defendant moved for dismissal with prejudice, upon an affidavit that plaintiff had failed to pay the $250.00 (R. 217). On July 2, 1942, plaintiff moved for a continuance to allow further introduction of evidence as to market value at the time of conversion, or alternatively, for an order dismissing the action without prejudice (R. 218).

On July 6, 1942, the court entered Findings of Fact and Conclusions of Law, finding that the Briskys owed plaintiff $770.11 on promissory notes secured by a first

mortgage lien on their 1937 fruit crop; that plaintiff had subordinated its lien to defendant to secure additional advances to the Briskys by defendant, such subordination being limited to 60 cents per box on all fruit sold; that defendant had advanced funds and rendered services to the Briskys to aid in financing the production, handling, and marketing of their 1937 fruit crop; that defendant received 1,137 boxes of apples from the Briskys and converted 298 boxes thereof to its own use; and that no proof was submitted as to whether defendant converted any of the remaining boxes or as to the value of fruit converted by defendant (R. 219–227). The Conclusion of Law was that the action should be dismissed with prejudice (R. 228). On the same date the court entered a judgment reciting that plaintiff had failed to comply with the preliminary order of April 29, 1942, and dismissed the entire complaint with prejudice (R. 229–230). The United States appealed (R. 230-231).

QUESTIONS INVOLVED

1. Whether the District Court erred in conditioning the granting of the Government's motion for a dismissal without prejudice upon the payment of $250.00 to defendant by way of reimbursement for funds expended in the preparation of its defense.

2. Whether the District Court erred in dismissing the entire complaint with prejudice because of the Government's failure to comply with such condition.

3. Whether the District Court, after a trial of one of the twenty causes of action alleged in the complaint, and after making findings of fact under that cause of

action that defendant had converted 298 boxes of fruit, erred in dismissing the entire action with prejudice.

SPECIFICATION OF ERRORS

1. The District Court lacked authority to condition the right of the United States to dismiss its action without prejudice upon the payment of $250.00 as reimbursement to defendant for the costs incurred in the preparation of its defense.

2. The District Court erred in dismissing the complaint of the United States with prejudice because of its failure to pay the sum of $250.00 to defendant.

3. The District Court erred in finding that only 298 boxes of apples had been converted.

4. The District Court erred in dismissing all twenty causes of action of the complaint though a hearing had been conducted only in respect to the third cause of action thereof.

5. The District Court, after finding that defendant was guilty of conversion, erred in dismissing the complaint with prejudice and in failing to enter judgment for plaintiff for at least nominal damages.

6. The District Court erred in failing to cause defendant to produce complete records as to the sale and disposition of the fruit mortgaged to plaintiff, as called for in the subpoena obtained by plaintiff.

7. The District Court erred in holding, in an action which was basically one for an accounting, that the burden was on the United States rather than upon defendant to establish the prices for which the mortgaged fruit had been sold.

8. The District Court erred in entering judgment for defendant.

SUMMARY OF ARGUMENT

I

The court below was in error in requiring that plaintiff reimburse defendant in the sum of $250.00 for expenditures incurred in the preparation of its defense, as a condition to granting plaintiff's motion for dismissal of the complaint without prejudice. The Government could not have been directly ordered to pay this sum to defendant because the United States is immune from the imposition of costs, and there is no other basis upon which judgment in any amount could have been rendered against plaintiff. Hence, although the Government's motion for voluntary dismissal without prejudice was addressed to the court's discretion, the court could not properly require the Government to waive one of its sovereign immunities, exemption from costs, as a condition to exercising the court's discretion in favor of the Government.

Even if the condition requiring payment of $250.00 to defendant was legal, the court abused its discretion in not unconditionally granting plaintiff's motion to dismiss without prejudice, or in the alternative, granting plaintiff a continuance. Twenty separate causes of action were involved in the complaint against twenty different borrowers who owed the Government a total of almost twenty thousand dollars, secured by a mortgage on their 1937 fruit crops. The third

cause of action was selected by order of the court as a test of the others, and in that cause plaintiff established conversion by defendant of 298 boxes of apples, although it was unable to prove their fair market value at the date of conversion. In view of the recognized public interest in the outcome of the litigation, and the fact that the cause of action tried was to be the test of the others, the court should have either granted the Government a voluntary dismissal without prejudice or continued the trial to enable the Government to produce the necessary expert witnesses. The latter course would have avoided the expense of another trial, which was the sole reason for the imposition of the condition that the Government pay defendant $250.00. The abuse of discretion in appending that condition—one impossible for plaintiff to meet—is heightened by the circumstance that plaintiff's failure to comply therewith resulted in dismissal with prejudice of twenty causes of action involving almost $20,000, notwithstanding that defendant was found guilty of conversion in the test cause of action.

II

The court erred in dismissing all twenty causes of action with prejudice. Even if the condition imposed by the court upon its granting of plaintiff's motion for dismissal without prejudice was valid, plaintiff's failure to comply with that condition should have been followed by a disposition of the case on the merits pursuant to defendant's motion to dismiss with prejudice.

The action sought an accounting of facts peculiarly within the knowledge of defendant—the disposition and proceeds of the 1937 fruit crop mortgaged to the United States and delivered by the mortgagors to defendant. After defendant produced the records showing the disposition and proceeds of 298 boxes, the court should have granted plaintiff's demand that defendant be ordered to produce similar records as to the remainder. Moreover, having found conversion by defendant of the 298 boxes of fruit as to which defendant had produced some records, it was error for the court not to have found conversion as to all other boxes of mortgaged fruit delivered by the Briskys to defendant.

In any event, since the court found that defendant had converted 298 boxes of fruit, plaintiff's failure to prove the market value of such fruit and hence the actual amount of damages sustained by reason of such conversion should have resulted in the award of nominal damages to the Government. The failure to make such an award prejudiced substantial rights of the United States, by determining conclusively against it nineteen separate causes of action even though the principle of defendant's liability had been established in the test cause of action. Moreover, if the United States had been awarded nominal damages, it would have been entitled, as the prevailing party, to recover costs against defendant. Consequently, the failure to award nominal damages to plaintiff on the third cause of action constituted reversible error.

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ARGUMENT

I

The court below erred in conditioning the dismissal of the complaint without prejudice upon plaintiff's reimbursing defendant in the sum of $250

1. The Government could not have been ordered to pay this sum to defendant

The immunity of the United States from costs in the absence of a statute to the contrary is established beyond question. *United States* v. *Barker,* 2 Wheat. 394; *United States* v. *Worley,* 281 U. S. 339, 344; *United States* v. *Chemical Foundation,* 272 U. S. 1, 20; *United States* v. *French Sardine Co., Inc.,* 80 F. (2) 325 (C. C. A. 9); *United States* v. *Knowles' Estate,* 58 F. (2) 718 (C. C. A. 9); *The Glymont,* 66 F. (2) 617, 619 (C. C. A. 2).[2] This exemption, which is predicated upon the immunity of the sovereign from unconsented suit, protects the United judgment is rendered against it as the defendant in the suit (*United States* v. *Worley,* 281 U. S. 339, 344), but also when it is unsuccessful as the plaintiff. *United States* v. *Chemical Foundation,* 272 U. S. 1, 20; *United States* v. *Boyd,* 5 How. 29, 51; *United States* v. *Dunbar,* 83 Fed. 151 (C. C. A. 9).

These principles have not been altered by the Rules of Civil Procedure for the Federal District Courts.

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[2] Since the United States itself is the plaintiff in the case at hand, the ruling in *Reconstruction Finance Corp.* v. *Menihan,* 312 U. S. 81, is inapplicable. Costs were there allowed against the Reconstruction Finance Corporation because the statute creating it, which enabled it to sue and be sued, was construed to carry liability for costs as a natural and appropriate incident of legal proceedings.

Rule 54 (d), which excludes the imposition of costs against the United States except "to the extent permitted by law," is "merely declaratory and effected no change of principle." *Reconstruction Finance Corp.* v. *Menihan,* 312 U. S. 81, 83; *cf. United States* v. *Sherwood,* 312 U. S. 584, 590. Consequently, unless a statute otherwise provides,[3] nothing in the federal rules permits costs to be assessed against the Government upon the dismissal of its complaint. *United States* v. *National Biscuit Co.,* 25 F. Supp. 329 (S. D. N. Y.).

Hence, if judgment on the merits had been rendered for defendant at the close of the trial, without plaintiff's intervening motion for dismissal, the court below could not have ordered plaintiff to pay $250 to defendant as reimbursement for its expenditures in defending the suit, in the guise of costs or otherwise; and this was acknowledged by the court below (R. 192, 195). And the fact that the court found defendant guilty of converting 298 boxes of fruit in violation of plaintiff's lien thereon (R. 226–227) would suffice to preclude it from costs regardless of the sovereign capacity of the plaintiff. *Cf. The Europe,* 190 Fed. 475, 481 (C. C. A. 9); *Gold Dust Corp.* v. *Hoffenberg,* 87 F. (2d) 451 (C. C. A. 2). There was of course no counterclaim or other demand by defendant against plaintiff, and no other theory has been suggested upon which judgment in any amount could have been rendered against plaintiff.

[3] For a collection of statutes providing for costs against the United States in specified situations, none of which are applicable here, see Notes of Advisory Committee on Rules to Rule 54 (d); 28 U. S. C. (1940 ed.) § 723c, p. 2642.

2. The condition attached to the granting of plaintiff's motion for dismissal without prejudice was an abuse of discretion

Since the United States could not have been ordered to pay $250 to defendant as costs or otherwise, it is submitted that the granting of a voluntary dismissal without prejudice may not be conditioned upon the making of such payment.

Recognizing the sovereign's immunity from costs,[4] the court below did not thus characterize the exaction of $250 which it required the United States to pay to defendant in order to obtain a dismissal without prejudice. Instead, the preliminary order of dismissal entered at the close of the trial recited that defendant "has necessarily expended considerable money in the preparation of its defense," and directed that, as a condition to dismissal of the action without prejudice, plaintiff pay defendant $250—admittedly an "arbitrary figure" picked "out of the air" (R. 195)—"to reimburse it for funds expended in the preparation of its defense" (R. 216). But partial reimbursement of the prevailing party for his expenses of litigation is the very objective of the allowance of costs,[5] and as shown above plaintiff is immune from costs as a matter of law.[6]

Although the court below had discretion to grant or deny the Government's motion for dismissal without

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[4] The court said (R. 192): "Now the rule is the Government is not responsible for costs, and there is no way the Government can be compelled to pay costs in the ordinary sense of the word."

[5] Sedgwick, *Damages* (9th ed. 1912), § 230.

[6] Even as costs, the assessment of $250 might be questioned. The costs allowed in the federal district courts include "the bill of fees of the clerks, marshal and attorney, and the amount paid

prejudice, and had the power to impose proper terms and conditions upon the granting of such a motion (Rule 41 (a) (2)), it is contended that, insofar as the United States is concerned, the terms and conditions can only be those to which the Government is fairly subject and with which it has power to comply. Without Congressional authorization, no officer of the Government may consent to the imposition of costs. *United States* v. *Chemical Foundation,* 272 U. S. 1, 20. The payment of an exaction from which the Government had sovereign immunity and which it was impossible for the Government to pay [7] is, we submit, an improper and illegal condition. The situation is analogous to that in which governmental authority conditions the grant of a privilege which it has the right to

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printers and witnesses, and lawful fees for exemplification of copies of papers." Rev. Stat., § 983, 28 U. S. C., § 830. Costs in actions at law do not normally include counsel fees, travel costs, or any other outlay incident to the preparation or trial of the case, except where provided by statute or contract specifically contemplating such allowance. McCormick, *Handbook on the Law of Damages* (1935), § 61, pp. 236, 237. Even in suits of an equitable nature where the court exercises its discretionary power to allow costs beyond the statutory scale, the allowance generally occurs only against a party who has vexatiously instituted groundless litigation or instituted suit in bad faith. *Cf. Guardian Trust Co.* v. *Kansas City So. Ry.*, 28 F. (2) 233 (C. C. A. 8); *Gold Dust Corp.* v. *Hoffenberg*, 87 F. (2) 451 (C. C. A. 2); *Abel* v. *Loughman*, 1 F. R. D. 734 (E. D. N. Y.).

[7] The Department of Justice Appropriation Acts for the fiscal years 1942 (55 Stat. 265, 294) and 1943 (Pub. 644, 77th Cong. 2d Sess.), from which expenses of litigation are paid, were available for expenses "in courts other than Federal courts." There is no suggestion of any other appropriation to which the United States could properly have charged the $250.

withhold upon terms which there was no power to impose directly, an exercise of power commonly held to be illegal.[8]

3. Plaintiff's motion for a dismissal without prejudice or for a continuance should have been granted unconditionally

Even if the condition requiring payment of $250 could validly have been imposed upon the United States, it is submitted that in the circumstances of this case, it was an abuse of the trial court's discretion not to grant unconditionally plaintiff's motion for a dismissal without prejudice or, in the alternative, for a continuance.

Twenty separate causes of action were here involved, seeking an accounting of the disposition and proceeds of the 1937 fruit crops delivered to defendant by twenty different borrowers who owed the United States a total of $19,738.98, secured by a mortgage on those crops (see Appendix, p. 31, *infra*). At the court's direction, the third cause of action involving a claim of only $770.11 was selected for trial as the test case, the judgment in that cause to be applicable to the other nineteen causes (R. 219, 229). In the test cause of action, the United States established conversion of 298 boxes of fruit by defendant (R. 227) but was unable to prove the market value of such fruit. The court recognized the public interest in this litigation and in vindicating the Government's lien upon the crops (R. 190–191), and these

[8] *Cf.* Hale, "Unconstitutional Conditions and Constitutional Rights" (1935), 35 Col. L. Rev. 321, 344; *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532–533.

considerations impelled the court to "grant" the Government's motion for non-suit instead of passing upon the merits of the case (R. 190).

The only factor which led the court to impose the condition that plaintiff pay defendant $250 was the expense to defendant which a second suit would entail (R. 192–193). But expense to the other litigant is immaterial where the United States is the opposing party. As the court below recognized (R. 195), the Government's traditional immunity from costs applies even though its unsuccessful suit has resulted in a substantial expense to defendant in defending the litigation.[9] The application of this principle is especially compelling in the present case since, as the court below observed (R. 195), at least part of the time spent on the trial by defense counsel would not be wasted at a new trial. And the fact that a dismissal without prejudice might lead to a second suit upon the same subject matter is of course the entire purpose of such a dismissal; that circumstance alone clearly cannot constitute grounds for its denial.[10]

Moreover, if the dual expense of two trials were to be avoided, the court below had merely to grant plaintiff's alternative motion for a continuance (R. 218), to enable plaintiff to obtain a qualified expert on market

[9] This was unquestionably the situation in decisions upholding the federal immunity from costs, such as *United States* v. *Boyd*, 5 How. 29, 51; *United States* v. *Chemical Foundation*, 272 U. S. 1, 20; *United States* v. *French Sardine Co., Inc.*, 80 F. (2d) 325 (C. C. A.).

[10] *Olsen* v. *Muskegon Piston Ring Co.*, 117 F. (2d) 163 (C. C. A. 6).

value in order to supply evidence as to the amount of damages suffered from defendant's conversion. Such procedure would have secured the "just, speedy, and inexpensive determination" of the action which the new Federal rules were intended to achieve (see Rule 1). And the Government's substantial interest in preserving an action in which defendant's liability had been established in its favor by the finding of conversion, confirms plaintiff's *bona fides* in seeking a continuance or a nonsuit.

When the effect of the denial of plaintiff's motion is appraised, the abuse of the court's discretion becomes even more patent. Because of inability to prove the amount of damages in one cause of action involving a claim of only $770—a cause of action in which the court found defendant guilty of conversion—all twenty causes of action involving total claims of almost $20,000 were dismissed with prejudice, thereby barring further proceedings on nineteen independent causes of action which were not tried. Because the equities were so clearly with plaintiff in these circumstances,[11] we submit that the court's denial of plaintiff's motion, except upon condition that plaintiff reimburse defendant $250, constituted an abuse of discretion justifying reversal by this court. cf. *Kelso* v. *Maclaren,* 122 F. (2d) 867 (C. C. A. 8).[12]

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[11] *Cf. Hughes* v. *Moore*, 7 Cranch. 176, 189; see Hughes, *Federal Practice* (1940) § 23432.

II

The court erred in dismissing all twenty causes of action with prejudice

1. Upon plaintiff's failure to pay defendant $250, the court should have decided the case as though plaintiff's motion for dismissal without prejudice had not been made

Even if the condition imposed by the court below upon granting plaintiff's motion for dismissal without prejudice was proper, the court erred in dismissing the entire complaint with prejudice when plaintiff failed to comply with that condition.

By the court's order, the third cause of action was selected for trial out of the twenty causes of action in suit, the judgment therein to be applicable to the others (R. 46, 187, 190, 219, 229). Since each of the twenty causes of action set up in the complaint in-

[12] To support its condition upon the grant of plaintiff's motion for dismissal without prejudice, the court below cited *Welter* v. *DuPont*, 1 F. R. D. 551 (D. Minn.); *McCann* v. *Bentley Stores Corp.*, 34 F. Supp. 234, 235 (W. D. Mo.); *Hawkinson Co.* v. *Goodman*, 32 F. Supp. 732 (S. D. Cal.); and *DeFilippis* v. *Chrysler Sales Corp.*, 116 F. (2d) 375 (C. C. A. 2). All these cases involve private litigants; no case has been found in which a court required the United States to pay costs or expenses to defendant in order to obtain a dismissal under Rule 41 (a). Indeed, since the adoption of the new federal rules, it has been held that costs cannot be granted upon the dismissal on defendant's motion of an action brought by the United States (*United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S. D. N. Y.)) as this court had held before the new rules on sustaining a demurrer to the Government's complaint. *United States* v. *Dunbar*, 83 Fed. 151 (C. C. A. 9). The cases cited by the court below are also factually distinguishable in that none of them involved a trial of one count as a test of multiple counts in the complaint.

volved different borrowers, a different crop and a different amount due the United States (see Appendix, p. 31 *infra*), the judgment in the test cause of action was plainly intended to establish defendant's liability *vel non,* so that the amount of damages could then be determined for each separate cause of action. In the test cause, the theory of liability was decided in favor of plaintiff (R. 134–135, 138, 143, 145, 172), and the issue of liability was likewise decided in its favor when the court found that defendant had converted 298 boxes of fruit (R. 226–227).

Assuming (without conceding) that the court below properly conditioned a dismissal without prejudice upon plaintiff's paying $250 to defendant in reimbursement for expenditures "in the preparation of its defense" (R. 216), plaintiff's noncompliance with that condition should have led to a denial of plaintiff's motion and disposition of the case as though plaintiff's motion had never been made.[13] There was no legal justification whatever for dismissing the complaint with prejudice solely because of the Government's

[13] Where a motion at the trial to dismiss without prejudice is denied, the court will resume the trial or proceed to decide the case on the merits. *Delehanty* v. *Newark Morning Ledger Co.*, 26 F. Supp. 327 (D. N. J.); *Cincinnati Traction Bldg. Co.* v. *Pullman-Standard Car Mfg. Co.*, 25 F. Supp. 332 (D. Del.); *Taylor* v. *Swift & Co.*, 2 F. R. D. 424 (S. D. Fla.). Compare the situation in which a motion for a nonsuit is granted unconditionally and then set aside; in such circumstances, the case is reinstated and stands "as though it had never been dismissed," the plaintiff being restored to all its rights. 27 C. J. S., §§ 44, 85; pp. 204, 274. Plaintiff's rights can be no less where its motion for nonsuit is denied initially.

failure or refusal to comply with the condition.[14] At that posture of the case, defendant had moved to dismiss with prejudice, which was equivalent to a common-law demurrer to plaintiff's evidence;[15] consequently, the court could properly have decided the cause on the merits. And on the merits, plaintiff was clearly entitled to judgment either for a full accounting under all twenty counts, or for nominal damages in conversion under the third count, with a resumption of the trial to determine the amount of damages in the remaining nineteen causes of action.

2. The court below erred in not requiring a full accounting by defendant

The causes of action alleged in the complaint were equitable in nature, seeking an accounting from a lienor who had disposed of property upon which plaintiff also had a lien, and praying for judgment in the amount found to be due after satisfaction of defendant's limited prior rights under the subordination agreement (R. 12–13). The court below ruled that defendant was under a duty to account to plaintiff for the proceeds received from the sale of the Briskys' fruit, over and above defendant's first lien thereon

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[14] The case of *DeFilippis* v. *Chrysler Sales Corp.*, 116 F. (2d) 375 (C. C. A. 2), in which the complaint was dismissed with prejudice after plaintiff failed to pay defendant $250 as the condition imposed upon the dismissal without prejudice, is not in point. There the motion to dismiss occurred *before* trial; consequently, there was no record, as here, to support any decision on the merits other than one favoring the defendant.

[15] *Chicago Metallic Mfg. Co.* v. *Edward Katzinger & Co.*, 123 F. (2d) 518, 519 (C. C. A. 7); *Nicholson Transit Co.* v. *Bassett*, 42 F. Supp. 990, 991 (N. D. Ill.).

(R. 134–135, 138), and that if defendant did not disclose the dates and proceeds of the sales of the Briskys' fruit, plaintiff could prove its fair market value as of a reasonable time after it was delivered to defendant (R. 143, 145, 161, 172).[16] Defendant thereupon accounted for the disposition of 298 boxes, producing records showing the branch or purchaser to whom they had been shipped (R. 169). Plaintiff then demanded that defendant produce its records as to the disposition of the remainder of the Briskys' 1937 crop, all of which had been delivered to defendant (R. 168). The court sustained defendant's objection to this demand on the ground that it was not timely (R. 169). This was plainly error, for the cause of action was in terms one for an accounting, seeking the production of information solely within the knowledge and control of defendant. The court could properly have ordered defendant to account for the remainder by producing the necessary records showing shipments and proceeds received.[17] It could also have rendered judgment for plaintiff in the amount of any balance due from defendant, as determined in the accounting.[18] The court should, therefore, have ordered de-

[16] Where defendant fails or has rendered it impossible to account for the proceeds of mortgaged property to a junior lienor, the fair market value may be used as the basis for plaintiff's recovery. *Klinzing* v. *Blauw Bros. Inc.*, 160 N. Y. Supp. 631; *cf. In re Salmon Weed & Co.*, 53 F. (2) 335 (C. C. A. 2).

[17] *Cf. Milton* v. *Richardson*, 21 Misc. 380, 47 N. Y. Supp. 735; 1 C. J. S., § 41, p. 684.

[18] *Martin* v. *Morales*, 102 N. J. Eq. 535, 142 Atl. 31; *Equitable Life Assurance Society* v. *Winn*, 137 Ky. 641, 126 S. W. 153; 1 C. J. S., § 42, p. 687.

fendant to account in full, as prayed in the complaint, for the proceeds of the entire 1937 fruit crop delivered to defendant by the Briskys, upon which the United States had a first lien as to all proceeds in excess of 60 cents per box.

3. The court below erred in not finding conversion of all the fruit delivered to defendant

The court below found that 1,137 boxes had been delivered to defendant by the Briskys and that defendant had converted 298 to its own use (R. 226–227). It further found that there was "no proof submitted as to whether or not defendant converted any of the remaining boxes of apples" (R. 227). This, we submit, was error. The 298 boxes found to have been converted were covered by records produced by defendant, disclosing the disposition or sales price thereof. If conversion was found as to these, it was obviously error to find that there was no conversion as to boxes for which no figures whatever were produced by defendant. The failure to account for the disposition of property received may in such circumstances be deemed an admission of its conversion. *Cf. Equitable Life Assurance Society* v. *Winn,* 137 Ky. 641, 126 S. W. 153. The court's ruling had the effect of placing a premium upon defendant's refusing to perform its adjudicated duty to account. In view of the undisputed facts that defendant received and disposed of 1,137 boxes of fruit upon which it had only a limited first lien, and refused to account for the proceeds of more than 298 boxes, the court should have found con-

version by defendant as to all the 1,137 boxes in question.[19]

4. The court erred in not awarding plaintiff nominal damages for defendant's conversion of 298 boxes of fruit

Although in form the Government's action was for an accounting, in substance it could also be regarded as one for conversion. *Cf. Davin* v. *Dowling,* 146 Wash. 137, 262 Pac. 126. The court below so considered it (R. 134–135, 172) and made a finding of fact that defendant had converted 298 boxes of fruit (R. 228). Such characterization of the cause of action involved was entirely proper, for a mortgagee may sue a senior lienor for conversion of the proceeds of mortgaged personal property which the latter had sold without accounting to the claimant for the balance due to him.[20] Moreover, since there is only one form of civil action under the new federal rules (Rule 2), the theory of action may be changed freely to conform to the facts adduced, with appropriate amendment of the pleadings if necessary.[21] The court having found under the third cause of action that defendant con-

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[19] Although the amount of damages was not proved as to the fruit found to have been converted, the failure to find conversion as to all of the Briskys' fruit was prejudicial because it adversely affected plaintiff's substantive rights under the remaining nineteen causes of action, to which the judgment in the third cause was to be applicable.

[20] *Lafeyth* v. *Emporia Nat. Bank*, 53 Kan. 51, 35 Pac. 805; *Long* v. *Crawford Finance Co.*, 18 Oh. Op. 252, 6 Oh. Supp. 36; *Brown* v. *Miller*, 108 N. C. 395, 13 S. E. 167; *Lowe* v. *Wing*, 56 Wis. 31, 13 N. W. 892; *DeVaughn* v. *Harris*, 103 Ga. 102, 29 S. E. 613.

[21] *American Fork & Hoe Co.* v. *Stampit Corp.*, 125 F. (2) 472, 474 (C. C. A. 6); *Lientz* v. *Wheeler*, 113 F. (2) 767, 769 (C. C. A. 8); *Simms* v. *Andrew*, 118 F. (2) 803, 807 (C. C. A. 10).

verted 298 boxes of fruit but that there was no evidence as to the value of such fruit (R. 227), plaintiff under well-settled principles was entitled to judgment for at least nominal damages on its third cause of action.[22]

5. Failure to award nominal damages to plaintiff is reversible error because substantial rights of plaintiff were impaired thereby

The erroneous failure of a trial court to award nominal damages to a plaintiff and the rendition of judgment for the defendant, is generally not ground for reversal unless the protection of a substantial right or the interests of justice so require.[23] In the case at hand, the court's refusal to award a judgment for nominal damages to the United States was reversible error because it prejudiced a substantial right of the Government in nineteen other causes of action involving almost $20,000 in claims, and deprived the United States of its right to recover costs as the prevailing party.

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[22] *Trinidad Creamery Co.* v. *McDonald*, 82 Colo. 328, 259 Pac. 1028; *Yanosh* v. *Earley*, 67 Pa. Sup. Ct. 585; *Northwestern Equipment Co.* v. *Sofe*, 91 Wash. 118, 157 Pac. 459; McCormick, *Damages* (1935 ed.), § 22; Restatement, *Torts* (1939), § 907.

The right to recover nominal damages, of course, applies to the United States, when suing as plaintiff, in the same way as to any prevailing private litigant. *United States* v. *Mock*, 149 U. S. 273; *cf. Mountain Copper Co.* v. *United States*, 142 Fed. 625 (C. C. A. 9), appeal dismissed, 212 U. S. 587.

[23] *United States* v. *Withers*, 130 Fed. 696 (C. C. A. 2); *East Moline Co.* v. *Weir Plow Co.*, 95 Fed. 250 (C. C. A. 7); *Anderson* v. *Lavelle*, 285 Mich. 194, 280 N. W. 729; *Doyle* v. *Union Bank & Trust Co.*, 102 Mont. 563, 59 P. (2) 1171, 1180; *Heater* v. *Pearce*, 59 Neb. 583, 81 N. W. 615; *Blow* v. *Joyner*, 156 N. C. 140, 72 S. E. 319, 320; McCormick, *Damages* (1935 ed.), § 24.

(a) *Prejudice to nineteen other causes of action.*— In view of the directions of the court that the third cause of action be tried as a test case and that the judgment therein be applicable to the other nineteen causes of action (R. 219, 229), the adjudication of plaintiff's right to recover for the conversion found in the third cause of action, even if accompanied by an award of only nominal damages, would have been of definite advantage to the Government by establishing a similar right of recovery in the other nineteen causes of action. The substantive liability having once been adjudicated, there would have remained solely the task of determining the amount of damages in each of the other causes of action.[24] Since the nominal damages in the third cause of action would thus have been of some practical benefit to plaintiff, by justifying the establishment of actual damages in the other nineteen causes of action, the dismissal of all twenty with prejudice after finding conversion in the test cause of action constituted reversible error.[25]

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[24] The court below, during the trial, expressed the opinion that the damages involved in the third cause of action might amount to only forty or fifty dollars under the construction of the subordination agreement urged by plaintiff (R. 191), but it is clear that the court was referring only to the 298 boxes whose disposition was accounted for by defendant. The total amount alleged to be due plaintiff from the borrowers involved in the other causes of action amounted to a substantial sum (see Appendix, p. 31, *infra*), and the Government now has available competent evidence as to market value of the 1937 crops delivered to defendant by these borrowers—the only factor which blocked the determination of the base below on the merits.

[25] *Lord* v. *Pathe News*, 97 F. (2) 508 (C. C. A. 2); *Chapin-Sacks Mfg. Co.* v. *Hendler Creamery Co.*, 254 Fed. 553, 559 (C. C. A. 4).

(b) *The United States as the prevailing party was entitled to costs.*—An additional circumstance which renders the failure to award nominal damages reversible error is the fact that the Government would have been entitled to costs if judgment had been entered in its favor.

The court below found defendant guilty of conversion, leaving open only the question of damages. This was necessarily an adjudication that defendant had invaded the substantive rights of the United States, a decision making the United States the prevailing party and entitling it to the recovery of costs,[26] irrespective of the amount of damages recovered.[27] The United States, although immune from costs, is entitled to them if it is the prevailing party.[28] Such right to costs, for which the Government had prayed in its complaint (R. 13), is a "substantive right and not a mere matter of procedure". *United States* v. *French Sardine Co.*, 80 F. (2) 325, 326 (C. C. A. 9). The failure to allow

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[26] *Cf. Denver & R. G. W. Ry.* v. *Linck*, 56 F. (2) 957, 962 (C. C. A. 10); *Crowe* v. *Peaslee-Gaulbert Co.*, 37 F. (2) 216, 218 (C. C. A. 1); *Hodgman* v. *Atlantic Refining Co.*, 20 F. (2) 949, 951 (D. Del.); *Chesapeake Transit Co.* v. *Mott*, 169 Fed. 543, 548 (C. C. A. 3).

[27] The right of a prevailing party to recover costs is subject, in certain cases in the federal courts, to the exception that the plaintiff recover not less than $500 exclusive of costs (Rev. Stat. § 968; 28 U. S. C. § 815), but the United States is expressly exempted from that requirement.

[28] *Pine River Co.* v. *United States*, 186 U. S. 279, 280, 296; *United States* v. *Verdier*, 164 U. S. 213, 219; *United States* v. *Sanborn*, 135 U. S. 271; *United States* v. *So. Pacific R. R.*, 56 Fed. 865 (C. C. A. 9); *United States* v. *Jardine*, 81 F. (2) 747, 748 (C. C. A. 5); *Solomon* v. *Welch*, 28 F. Supp. 823 (S. D. Calif.).

nominal damages where necessary to carry costs constitutes the denial of a substantial right for which the appellate court will reverse.[29]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed, and that the case should be remanded to the district court with directions to take any of the following steps, in its discretion: (1) to dismiss the complaint without prejudice, or (2) to continue the trial in order to receive evidence of market value, or (3) to order defendant to account in full for the disposition and proceeds of the 1937 fruit crop delivered to it by the Briskys upon which plaintiff held a mortgage, or (4) to enter judgment for plaintiff on the third cause of action in the amount of nominal damages, and to proceed to trial of the remaining nineteen causes of action on the issue of damages.

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[29] *State ex rel. Armour Packing Co.* v. *Dickman*, 146 Mo. App. 396, 124 S. W. 29; *Heater* v. *Pearce*, 59 Neb. 583, 81 N. W. 615.

APPENDIX

The twenty separate causes of action set up in the complaint filed by plaintiff in this matter are identical with the third cause of action (set forth in R. 2–13) except for paragraphs III to VII, inclusive. These specify the borrowers (Par. III), the loans made to them and the amount of indebtedness due therefrom to the United States (Pars. III, IV, VII), the date of execution of the crop and chattel mortgage to the United States conveying a first lien upon the 1937 fruit crops produced by the borrowers (Par. V), and the real property upon which such fruit crops are to be produced (Par. VI) (See R. 3–6).

The borrowers in the twenty causes of action, and their indebtedness alleged to be due to the United States at the date of filing the complaint, are as follows:

Cause of action	Name	Date of mortgage	Amount
First	Victor and Martha Beckman	June 7, 1937	$1,700.00
Second	J. J. and Nellie Biggs	Apr. 14, 1937	1,015.13
Third	George M. and Evelyn Brisky	Apr. 9, 1937	770.11
Fourth	Ray H. and Alice Bumgarner	Apr. 14, 1937	802.63
Fifth	Pearlie S. and Flossie Byrd	May 26, 1937	1,235.00
Sixth	Homer and Bessie Duncanson	Apr. 19, 1937	656.09
Seventh	H. W. and Gladys Dusseau	Apr. 26, 1937	1,110.63
Eighth	Harold C. and Louise Enlow	Apr. 15, 1937	895.97
Ninth	Burns Hardesty	Apr. 12, 1937	195.96
Tenth	Everett H. and Phyllis Joy	Apr. 12, 1937	1,264.01
Eleventh	George J. and Ethel Koehler	Apr. 12, 1937	805.00
Twelfth	Bert and Carrie Kuhnert	May 8, 1937	609.35
Thirteenth	James and Anna Kutil	Apr. 15, 1937	697.92
Fourteenth	Dan Reiman	Apr. 29, 1937	2,056.21
Fifteenth	J. L. and Eugenia Webster	May 7, 1937	947.29
Sixteenth	S. B. and Lillian A. West	Apr. 14, 1937	1,059.09
Seventeenth	Charles J. and Nellie Yenter	Apr. 9, 1937	830.00
Eighteenth	George A. and Margaret L. Young	Feb. 9, 1937	1,085.21
Nineteenth	George and Ella Hartwig	Apr. 19, 1937	523.80
Twentieth	Albert and Elise Heinz	Apr. 14, 1937	1,479.52
			19,738.98

On April 30, 1943, counsel for the parties hereto entered into the following stipulation:

> It is stipulated and agreed by counsel for the parties in the above-entitled matter, that the complaint filed therein by the United States of America, in the District Court of the United States for the Eastern District of Washington, Northern Division, on January 22, 1941, may be referred to by either party to this appeal, in the brief and argument of such party, to the same extent as if the said complaint were printed in full in the transcript of the record on this appeal.

U. S. GOVERNMENT PRINTING OFFICE: 1943